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Utah State Bar Annual Real Estate Section Meeting

Recent Utah Court of Appeals Opinions

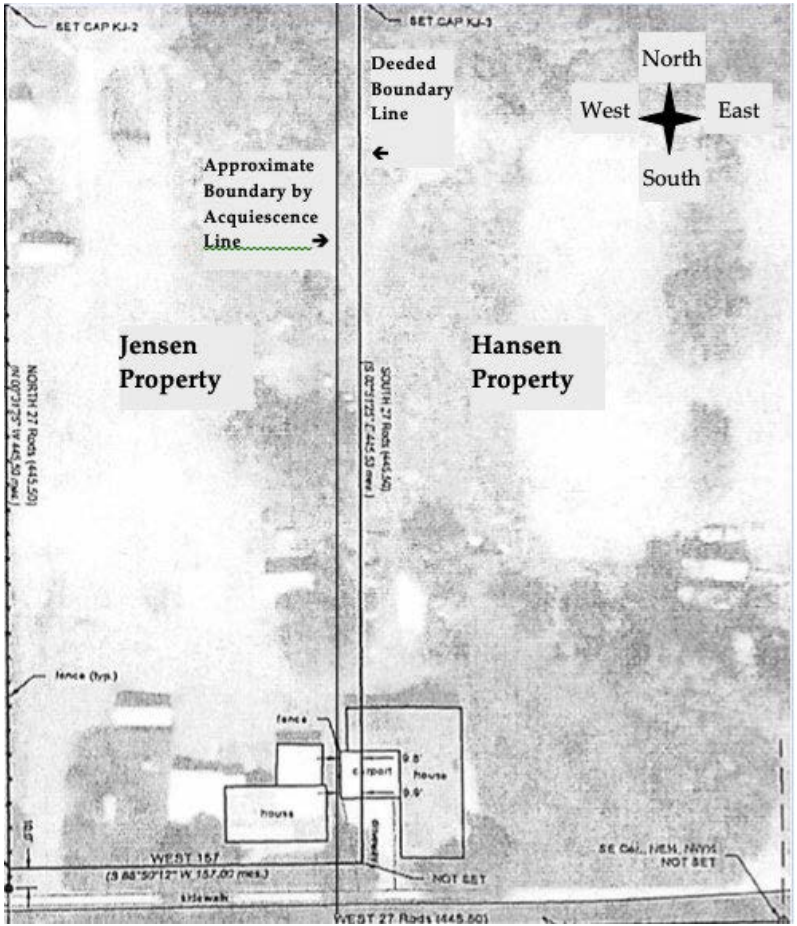
May 23, 2022

Boundary by Acquiescence

Hansen v. Kurry Jensen Properties (2021 UT App 54)

Standards for boundary by acquiescence:

- Visible line marked by monuments, fences, buildings, or natural features treated as a boundary
- Sufficient markers to delineate the boundary
- Mutual acquiescence to the boundary
- A period of at least twenty years



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Boundary by Acquiescence

Hansen v. Kurry Jensen Properties (2021 UT App 54) (cont'd)

- Standard for acquiescence is "an objective determination based solely on the parties' access in relation to each other and to the line serving as the boundary."

- "A party's subjective belief will be considered evidence of mutual acquiescence only to the extent that such understanding is based on the objective actions of the landowners."

Boundary by Acquiescence

Hansen v. Kurry Jensen Properties (2021 UT App 54) (cont'd)

- The court used a series of markers to determine the disputed boundary—a tree stump, a carport, a garage, shed, and chain link fence.

- The court did not focus on the contention that one party thought the prior fence had been constructed to contain livestock, but on how the parties subsequently treated the boundary area.

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Boundary by Acquiescence

Lundahl Farms v. Nielsen (2021 UT App 146)

- A family farm once owned by a single ancestor was split into two parcels and transferred.

- The cattle operations on the farm continued as under the common ancestor, with a shed, equipment, and vehicles of one owner located on the property of the other owner.

Boundary by Acquiescence

Lundahl Farms v. Nielsen (2021 UT App 146) (cont'd)

- After Lundahl, the owner with the sheds on his property, became aware of where the deeded boundary actually was, he sent the other owner, Nielsen, a demand letter to remove his personal property, including "outbuildings and/or permanent fixtures."

- The property was not removed, Lundahl filed suit for eviction, and Nielsen asserted counterclaims for boundary by acquiescence.

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Deeded Property Lines of Parcels 33 and 34

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03-060-0033
Ancestral Home
03-060-0035
Eastern
Road
Western
Road
Disputed Area of Parcel 34

Boundary by Acquiescence

Lundahl Farms v. Nielsen (2021 UT App 146) (cont'd)

- The case discusses (1) relationship of subjective to objective acknowledgement, (2) evidence of permission to occupy, and (3) evidence of co-occupation of the disputed area.

- "Although a party's subjective intent has no bearing on the existence of mutual acquiescence, a party's subjective belief may have some relevance to mutual acquiescence, as long as the belief is supported or created by the objective actions of the parties."

Boundary by Acquiescence

Lundahl Farms v. Nielsen (2021 UT App 146) (cont'd)

- Permission from the owner allowing the claimant's use defeats a claim that the parties mutually acquiesced to the asserted boundary.
- In this case, the landowner defending against boundary by acquiescence had never required compensation, rent, permission for land use, or permission to establish a fence or use the corral."
- "Even uses that are seemingly minimal compared to the claimants' activities can be inconsistent with acquiescence."

Boundary by Acquiescence

Huck v. Ken's House LLC (2022 UT App 64)

- A fence, which was several feet from the deeded boundary line between two properties, fell into disrepair.
- One landowner removed the fence and built a garage on part of the disputed property.
- The other landowner claimed he had acquired that property by boundary by acquiescence.

Boundary by Acquiescence

Huck v. Ken's House LLC (2022 UT App 64) (cont'd)

- The court heard the evidence and determined that there was not clear and convincing evidence that the disputed property had been used in a way to put the other landowner on notice of a boundary by acquiescence claim.

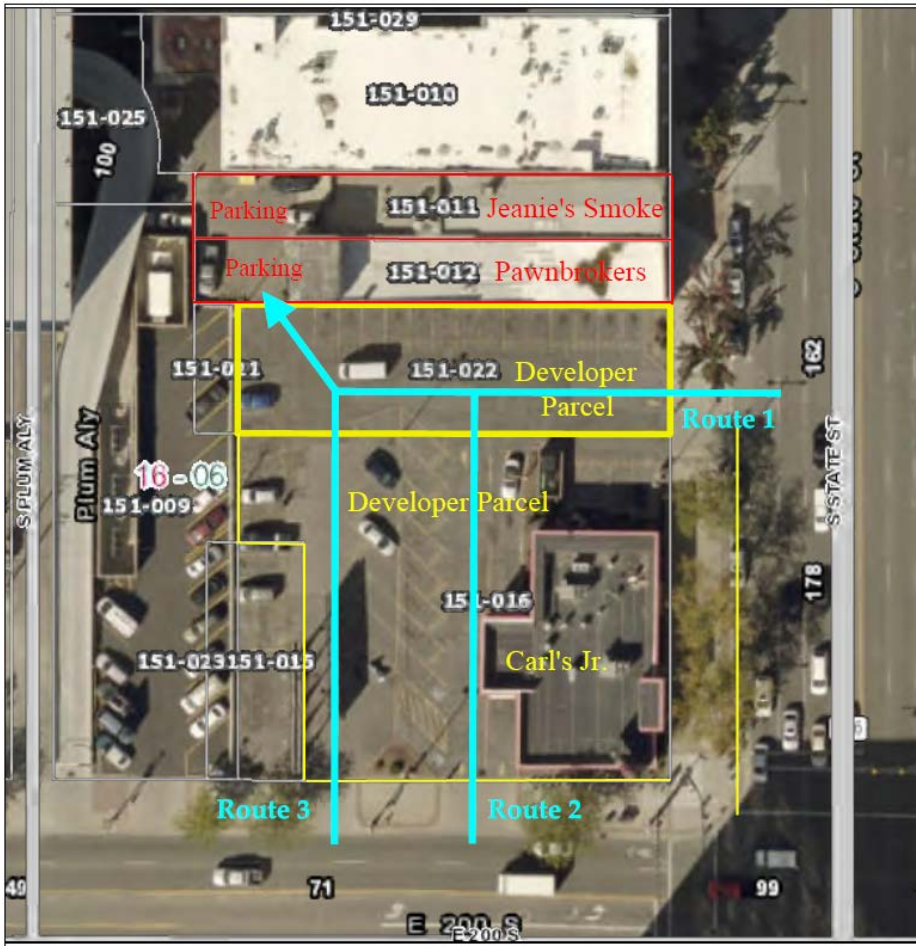
- The party claiming boundary by acquiescence recited mainly passive or temporary uses—"safety," temporarily storing equipment, and accessing the side of the building for maintenance.

- The witnesses were vague as to exactly where the activities had taken place, and the activities only took place along part of the disputed boundary.

Prescriptive Easements

M.N.V. Holdings v. 200 South (2021 UT App 76)

- MNV and its employees crossed a parking lot owned by 200 South LLC to reach MNV's own parking lot for over 20 years.
- There were three different paths used by MNV across the parking lot, depending on which road MNV employees used in approaching the parking lot.
- Clarifies the "continuous use" requirement for prescriptive easements.
- Continuous use can be obtained by using multiple paths over one period, but not by tacking different paths used during different periods.



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Foreclosures

Daniels v. Deutsche Bank National Trust (2021 UT App 105)

- Daniels defaulted in 2007 but made erratic payments through 2009.
- Bank recorded Notice of Default in September 2008 but did not proceed to sale.
- Daniels took out bankruptcy in September 2009, and bank debt was discharged in April 2010.

Foreclosures

Daniels v. Deutsche Bank National Trust (2021 UT App 105) (cont'd)

- Daniels wrote multiple letters asking to modify the debt or assume a new mortgage and keep their house, but the court found that they never acknowledged the debt.
- In 2016 Daniels filed suit.
- The court ruled that the six-year statute of limitations had run on the bank's right to foreclose, and quieted title to the property in Daniels' favor.

Foreclosures

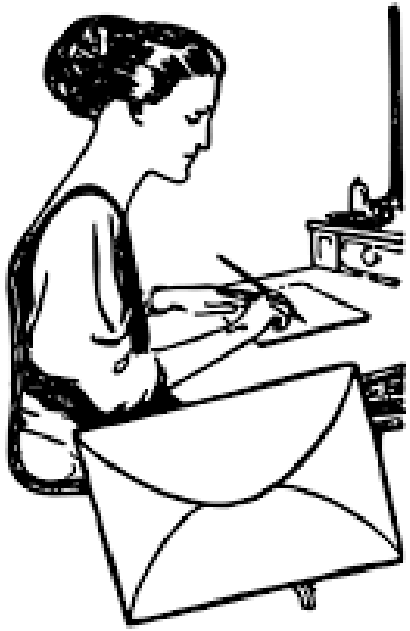
Daniels v. Deutsche Bank National Trust (2021 UT App 105) (cont'd)

- The statute of limitations for an obligation secured by a trust deed is six years (UCA 70A-3-118).
- Prior to May 2016, Utah law required that one of two actions be taken prior to expiration of the six-year period: (1) completion of a trustees sale or (2) filing of an action to foreclose a trust deed (UCA 57-1-34).
- Now, under UCA 57-1-34, for nonjudicial foreclosures, the filing of a notice of default, rather than completion of a trustees sale, must happen within the limitations period.

Foreclosures

Daniels v. Deutsche Bank National Trust (2021 UT App 105) (cont'd)

- Since neither the trustee's sale nor filing a foreclosure suit had taken place in the Daniels case, the court then considered when the six-year period began to run on enforcing the debt.
- Under the May 2019 version of UCA 78B-2-309(20), the statute of limitations for a credit agreement begins on the later of when (1) the debt arose, (2) the debtor made a written acknowledgment of the debt or promise to pay the debt, or (3) the debtor or a third party made a payment on the debt.
- The court ruled that the letters between Daniels and the lender didn't constitute acknowledgment of the debt or a promise to pay it, and so didn't restart the limitations period.



Foreclosures

Bradsen v. Shellpoint Mortgage Services (2022 UT App 10)

- Similar foreclosure situation to Daniels, but letters to lender were more explicit about the debt, and court found that statute of limitations was restarted in 2015 by those letters.

- Acknowledgment must be “clear, distinct, direct, unqualified and intentional.”

Foreclosures

Bradsen v. Shellpoint Mortgage Services (2022 UT App 10) (cont'd)

- Listing the wrong assignor on an assignment was not a "scriveners error", which could be corrected by affidavit.
- It also could not be retroactively corrected under the doctrine of relation back.
- The error could be corrected by rescission.

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Foreclosures

Kelly v. Timber Lakes (2022 UT App 23)

- HOA foreclosed a unit nonjudicially for owner's failure to pay assessments.
- The HOA did not wait three months between filing a Notice of Default and posting a Notice of Sale.
- The deed was neither void nor voidable.

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Foreclosures

Kelly v. Timber Lakes (2022 UT App 23) (cont'd)

- For a deed to be void, it must violate public policy, i.e., (1) violate legislative statements of public policy or (2) harm the public as a whole.
- A deed is voidable when "the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing."
- The appropriate remedy in this case was filing an injunction to stop the sale, which the plaintiff didn't do.

Arbitration Clauses in Construction Contracts

Willowcreek Associates of Grantsville LLC v. Hy Barr Incorporated (2021 UT App 116)

- Contractor entered into contract to remodel owner's apartment complex.
- The contract required that all claims "arising out of or relating to" the contract be submitted to arbitration.
- The owner failed to submit some claims to arbitration.
- The trial court dismissed those claims and refused to consider them, even though the arbitrator later asserted that it was not capable of resolving them.

Real Estate Contracts—Economic Loss Rule

Thorp v. Charlwood (2021 UT App 118)

- Plaintiff sued defendant, who had sold him a home, claiming defective construction, negligent misrepresentation, and fraudulent misrepresentation.
- The trial court dismissed the complaint on grounds that the economic loss rule barred the plaintiff's claim.

Real Estate Contracts—Economic Loss Rule

Thorp v. Charlwood (2021 UT App 118) (cont'd)

- The economic loss rule is a judicially created doctrine that prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute.

- The REPC included the same duties as the tort claim, and the Seller's Disclosure did not create a separate ground for recovery

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Liability of Landowners—Open and Obvious Danger Rule

Downham v. Arbuckle (2021 UT App 121)

- Plaintiff rented a home from defendant.
- Outside a back door was a wooden pallet that served as the back step.
- After the step broke one day, injuring the plaintiff, plaintiff sued for negligence.
- The defendant moved for summary judgment, asserting that the back step was an open and obvious danger.

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Liability of Landowners—Open and Obvious Danger Rule

Downham v. Arbuckle (2021 UT App 121) (cont'd)

- The appeals court clarified that "when there is an open and obvious danger, the land possessor may still be liable if, under the circumstances, he should anticipate that the invitee will be harmed by the dangerous condition."

- The appeals court noted that an invitee may "forget the danger," "become distracted from it," or "reasonably encounter the danger despite the risk."

Liability of Landowners—Open and Obvious Danger Rule

Zazzetti v. Prestige Senor Living Center LLC (2022 UT App 42)

- The resident of a senior living center slipped and fell on a patch of ice at her apartment complex.
- She sued the owner of the complex, notwithstanding a provision in her rental agreement that said that all tenants were responsible for keeping snow off stairs and walks in the winter.

Liability of Landowners—Open and Obvious Danger Rule

Zazzetti v. Prestige Senor Living Center LLC (2022 UT App 42) (cont'd)

- The open and obvious danger rule can apply in residential landlord-tenant context, at least where the accident occurs in a common area open to invitees.
- The case relies on the Downham analysis.

Mechanics Liens

Vineyard Properties of Utah LLC v. RLS Construction LLC (2021 UT App 144)

- The court ruled that a lien for work requested by a tenant attaches to the landlord's interest in the property.
- Under 2011 and 2012 amendments to the mechanics lien statute, landowners became responsible for mechanics liens filed for tenant improvements, even if the landowners did not sign the contracts.
- Before 2011, UCA 38-1-3 specified, "This lien shall attach only to such interest as the owner may have in the property."

Mechanics Liens

Vineyard Properties of Utah LLC v. RLS Construction LLC (2021 UT App 144) (cont'd)

- The legislature removed that language and also expanded definitions.
- "Owner" was defined as the person who owns the Project.
- "Project" was defined as "the real property on which or for which…construction work is or will be provided."

Remedies—Spoliation of Evidence

Diversified Concepts LLC v. Koford (2021 UT App 71)

- Homeowners entered into design and construction contracts for landscaping, including construction of rock retaining walls.
- Homeowners discovered that the walls were starting to fall apart before the project was finished.
- Both sides hired counsel and exchanged demand letters.
- Before filing a lawsuit, the homeowners hired other contractors to completely dismantle the walls and rebuild them.

Remedies—Spoliation of Evidence

Diversified Concepts LLC v. Koford (2021 UT App 71) (cont'd)

- The design firm and contractor moved to dismiss the lawsuit as a sanction for spoliation.
- They claimed that, without an opportunity to inspect and observe the demolition of the walls, their ability to defend the case had been irreparably compromised.
- The court discussed spoliation, including measures a party must take if it destroys material that it is presumptively duty-bound to preserve.

Remedies—Spoliation of Evidence

Diversified Concepts LLC v. Koford (2021 UT App 71) (cont'd)

- It must provide advance notice to the noncustodial party that allows for a full and fair opportunity to inspect that evidence, with the burden of proof on the custodial party.

- The notice must include: the anticipated claim; the factual and legal basis for the claim; the evidence relevant to that claim which will be destroyed; the reason the evidence needs to be destroyed; the date on which the evidence will be destroyed; and that the noncustodial party may inspect the evidence prior to and contemporaneous with its destruction.

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Gretta C. Spendlove is on the Board of Directors of Dentons Durham Jones Pinegar and practices in the Real Estate Section, the Business & Finance Section, and the Intellectual Property Section. Gretta represents buyers and sellers in purchasing, selling, leasing, and developing commercial real estate; advises startups and established entities in creating, buying, selling, merging, and maintaining partnerships, limited liability companies, and corporations, as well as entering into a wide range of business contracts. She also handles intellectual property issues such as trademarks and copyrights.

- Ranked in Chambers USA (2019-2021).
- Represents nationally recognized developer in acquisition, sale, and financing of business parks and retail centers.
- Represents developers in various zoning and permitting matters.
- Represents various Utah housing authorities in development and corporate matters.
- Manages portfolio of more than 100 trademarks for grocery store chain.
- Represented developer of outlet mall in $100 million financing.
- Represented developer of hotel/restaurant/multifamily development.
- Represented developer in construction and sale of two 100-unit multifamily projects.
- Represented developer as landlord in commercial leasing of office park and as tenant in multiple franchise operations.

Thank you

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